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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH LOPEZ,

Defendant and Appellant.

C059164

(Super. Ct. No.
06F05487)

A jury convicted defendant Joseph Lopez of assault with a firearm (Pen. Code, § 245, subd. (a)(2); unspecified section references that follow are to the Penal Code) (count 2) and the grossly negligent discharge of a firearm (§ 246.3) (count 3), and found a charged firearm enhancement to be true. (§ 12022.5, subd. (a)(1).) The jury was unable to reach a verdict on count 1, making a criminal threat (§ 422), and the court declared a mistrial on that count.

Sentenced to an aggregate unstayed sentence of 8 years, 8 months, defendant appeals, contending that (1) the prosecutor committed misconduct in cross-examining defendant, (2) the

court's determination to impose consecutive sentences violated defendant's right to jury trial, and (3) sentence on count 3 should have been stayed under section 654. None of these claims has merit and we therefore affirm the judgment.

FACTS AND PROCEEDINGS

On June 24, 2006, defendant had a confrontation with a food distributor inside a grocery store. The store supervisor, Herman A., told defendant to leave the store and then walked him to the door. Defendant threatened to beat up Herman and said he had "something" for him.

Early the next morning, defendant returned to the store and encountered Herman in one of the aisles. Defendant said, "I'm going to shoot you." He repeated his threat and added, "I don't care. I got warrants." He raised his arm and displayed a gun. Herman grabbed defendant, tackled him to the ground, and called for help. While pinned to the ground, defendant continued to threaten to shoot Herman. An assistant manager, Mike D., rushed over and pulled defendant's arm from under his body. Other employees also came over to help. Mike tried to grab the gun, but defendant pulled the trigger and fired a bullet that hit the checkout stand. Mike put his hand between the hammer and firing pin to prevent the gun from being fired again, but he felt the hammer hit his hand.

Other employees, including Louis H., helped subdue defendant, who was kicking at the employees surrounding him. Mike got the gun away from defendant but defendant continued to

struggle and shouted, "I'm gonna kill all of you. I'll come back with my boys and get you." Mike kicked defendant repeatedly in the head as defendant lay on the ground.

At trial, defendant denied threatening Herman with a gun, and asserted that the gun went off accidentally when the store employees attacked him.

A video of the incident, taken from the store's security camera, was played at trial.

The jury convicted defendant of assault with a firearm and the negligent discharge of a firearm and found a charged firearm enhancement to be true. The trial court sentenced defendant to an aggregate prison sentence of eight years, eight months, and this appeal followed.

DISCUSSION

I

Prosecutorial Misconduct

When cross-examining defendant, the prosecutor asked whether defendant remembered that Herman had testified, "you threatened to kill him," "that you had a gun in your hand," "that he saw you raise the gun towards him." Defendant responded that he remembered this testimony. The prosecutor then asked "And it's your contention he's making all that up?"

The trial court overruled defense counsel's objection that the question was speculative and argumentative. The prosecutor repeated his question, asking defendant "Are you saying that [Herman] lied about those things?" Defendant responded, "Yes."

The prosecutor then asked defendant if he remembered that another witness, Louis, had testified that "he saw the gun in your hand prior to [Herman] taking you to the ground." Defendant replied, "I heard him say a lot of those lies." The prosecutor asked, "So is it your contention that he is also lying?" and defendant answered, "Yes."

In redirect testimony, defendant stated that he did not think Louis was even present during the incident because he did not remember anyone grabbing his legs as Louis claimed he had done. Defendant repeated this statement when questioned by the prosecutor, and the prosecutor said, "And so he's making up everything that he said; is that right?" Defendant responded, "Yes, that's my belief."

Defense counsel subsequently moved to strike the prosecutor's cross-examination of defendant relating to the credibility of Herman and Louis, and she asked the court to remind the jury that credibility determinations were solely a jury function. The court denied the motion, ruling that the questions were not argumentative and, in this particular context, were not speculative because defendant was testifying about what he perceived had occurred. The court added that, in any event, the prosecutor's questions did not "even come close" to prosecutorial misconduct.

On appeal, defendant again contends that the prosecutor engaged in misconduct by asking these "were they lying" questions and that the court abused its discretion in refusing to strike defendant's answers to these questions. We disagree.

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] 'Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 176.)

As the California Supreme Court has explained, a prosecutor's "were they lying" line of questioning must be examined in context. This type of question "should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

"If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. [Citation.] Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. [Citation.]" (*People v. Chatman, supra*, 38 Cal.4th at p. 382.) However, "[a] defendant who is a percipient witness to the events at issue has personal

knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken." (*Ibid.*) That is particularly true if a defendant knows these witnesses and knows of reasons why they might lie. (*Ibid.*)

Here, while defendant did not know Herman or Louis, all of these individuals testified as percipient witnesses and had personal knowledge of events. (See *People v. Chatman*, *supra*, 38 Cal.4th at p. 382.) The prosecutor was entitled to question defendant about why his perception about what transpired differed from that of other witnesses and, in this context, the brief questions about whether these witnesses were lying did not constitute misconduct.

Moreover, we note that it was defendant himself who volunteered his opinion of Louis's credibility. When the prosecutor asked if defendant remembered Louis's testimony, defendant responded, "I heard him say a lot of those lies," and testified that he did not think Louis was even present at the store when this event took place. Under these circumstances, the prosecutor's questions relating to Louis cannot be deemed misconduct. (See *People v. Riggs* (2008) 44 Cal.4th 248, 318.)

Even if we were to conclude that the prosecutor's "were they lying" questions were improper, defendant cannot establish that any misconduct was prejudicial. The challenged questions did not present evidence that the jury would not have otherwise

inferred: defendant had one version of events, other witnesses had another. Defendant's unsurprising view that he was telling the truth and others were lying could not have affected jury deliberations. The court instructed the jury that it was to determine issues of credibility based on its own assessment of the evidence. There is no likelihood that defendant would have achieved a better result had these questions not been asked, nor was the trial infected with such unfairness as to deprive defendant of due process. (See *People v. Riggs, supra*, 44 Cal.4th at pp. 300-301.)

II

Alleged Violation of Right to Jury Trial

The trial court sentenced defendant to consecutive sentences on counts 2 and 3, concluding that defendant harbored separate criminal objectives in committing these offenses. Defendant contends that under principles enunciated *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856], this determination should have been made by the jury, not the court, and he asserts that this violation of his right to jury trial requires that his sentence be vacated.

As both the United States and California Supreme Courts have now held, the *Apprendi/Blakely/Cunningham* rule does not apply to the decision to impose consecutive sentences. (*Oregon v. Ice* (2009) 555 U.S. ____ [172 L.Ed.2d 517]; *People v. Wilson*

(2008) 44 Cal.4th 758, 813; *People v. Black* (2007) 41 Cal.4th 799, 821-823; see also *People v. Quintanilla* (2009) 170 Cal.App.4th 406, 414.) Defendant's argument is defeated by these decisions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III

Section 654

Defendant contends that section 654 precludes the imposition of consecutive sentences on counts 2 (assault) and 3 (discharging a firearm) because he did not harbor separate criminal intents in committing these offenses. We disagree.

Section 654 precludes multiple punishments for two crimes arising from a single indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) Subdivision (a) of this statute provides in relevant part that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

If, however, a defendant acts with multiple criminal objectives that are independent of each other, the defendant may be punished for each offense, even though the violations are parts of an otherwise indivisible course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

As the California Supreme Court has noted, courts have limited the application of section 654 in various ways. (*People*

v. Latimer, supra, 5 Cal.4th at p. 1211.) “Some have narrowly interpreted the length of time the defendant had a specific objective, and thereby found similar but *consecutive* objectives permitting multiple punishment[s]. [Citations.] [¶] Other cases have found separate, although sometimes simultaneous, objectives under the facts. [Citations.]” (*Id.* at pp. 1211-1212.)

The defendant’s intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1265.) “We review the court’s determination of [a defendant’s] ‘separate intents’ for sufficient evidence in a light most favorable to the judgment, and presume in support of the court’s conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

Here, the shooting did not occur in the course of the assault. The prosecutor argued that defendant committed an assault when he first pointed his gun at Herman in the grocery aisle. Defendant did not fire the gun until he was tackled and on the ground, surrounded by other employees.

As the trial court noted in ordering consecutive sentences for the two offenses, “two separate and distinct crimes . . . were committed.” Defendant was “taken to the ground and he was being subdued by several individuals and he had his hand on the firearm and he was told a number of times by the individuals to

let go of the firearm and don't pull the trigger. . . . [¶]
The mental state of [defendant] from going by way of the assault
on [Herman] to then discharging the firearm negligently was a
complete and separate incident that did not have to happen. It
was not a continuation of the first. He could have simply let
go of the firearm and let the thing stop but didn't. He chose
to pull the trigger, and that constitutes the separate
distinctive event."

The evidence bears out the trial court's assessment, and
the court properly imposed sentence on both counts 2 and 3.
Contrary to defendant's claim, this sentence did not violate
section 654. There was no error.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SIMS, Acting P. J.

BUTZ, J.